DOT/avs 3/7/2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks.	Rulemaking 93-04-003 (Filed April 7, 1993)
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	Investigation 93-04-002 (Filed April 7, 1993) (Verizon UNE Phase)

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING MOTION TO COMPEL DISCOVERY IN PART AND DENYING MOTION TO STRIKE

Motion to Compel

On February 2, 2005, Verizon California, Inc. (Verizon) filed a motion to compel discovery of new versions of the model description, input portfolio, and model code that are "red-lined" to reflect all changes made in the HAI Model Verision 5.3 (HM 5.3) filed on November 9, 2004 by AT&T Communications of California, Inc. (AT&T) and MCI, Inc. (MCI) (collectively, Joint Commentors). Verizon claims this information has been customarily provided with earlier HM 5.3 model revisions and is essential for Verizon to evaluate the newest version of HM 5.3.

Joint Commentors respond that the documents Verizon seeks do not exist and it would be improper to compel Joint Commentors to create new documents in the discovery process. Furthermore, they maintain that their rebuttal filing of

November 9, 2004 and the summary table provided on January 21, 2005 contain adequate description of all HM 5.3 modeling changes. Therefore, the documents Verizon seeks are unnecessary. Finally, Joint Commentors respond that it would be relatively simple to prepare a list of model input changes.

I will grant Verizon's motion to compel in part and direct Joint Commentors to provide a redlined list of model input changes no later than March 1, 2005. In all other respects, Verizon's motion to compel is denied. I agree with Joint Commentors that all information necessary to understand the rebuttal version of HM 5.3 should be contained in Joint Commentors' rebuttal filing or the summary table provided in January 2005 in response to Verizon's motion for surrebuttal. I do not want to prolong this already extraordinarily lengthy proceeding by ordering Joint Commentors to produce more modeling documentation, and I am not convinced that this information would prove useful to the Commission in its assessment of which model to use to set Verizon's unbundled network element (UNE) prices. Verizon's logic is somewhat circular in that it argues it needs additional redlined modeling documents so it can find model changes that Joint Commentors have not described. Verizon's request is too vague and a research expedition of this magnitude will certainly delay the proceeding. The time has come for the Commission to evaluate the HM 5.3 and Verizon cost models based on the voluminous information that has already been filed.

Although Verizon contends it needs these redlined documents to produce its response to the summary table of HM 5.3 model changes, Verizon has already identified changes to HM 5.3 in its December 3, 2004 motion for surrebuttal without the aid of any of these redlined documents. Further, in a conference call with the Administrative Law Judge and all parties on February 24, 2005, Verizon

indicated that it believes there are several errors or omissions to the summary table. Verizon should describe what it believes are errors or omissions to the summary table based on its understanding of HM 5.3 at this point. If Verizon knows of HM 5.3 changes that are not described, it should identify them. In other words, if changes listed in Verizon's December 3, 2004 motion are not described in the Joint Commentors' January 2005 matrix, Verizon should explain this. If Verizon has found what it believes are inappropriate HM 5.3 changes, it should describe them.

If Joint Commentors' rebuttal filings and summary table do not adequately describe or support modeling changes, or introduce modeling changes that extend beyond earlier criticisms by other parties, then I will either strike those changes or seek limited additional modeling information as I deem necessary, along with appropriate opportunities for all parties to comment.

Motion to Strike

On February 8, 2005, Verizon filed a motion to strike portions of the reply comments and testimony of MCI that relate to MCI's use of the "sum of the UNEs" method of establishing price floors. Verizon contends that MCI's comments and testimony are improper late-filed direct testimony on price floors that should have been filed in November 2003. Moreover, Verizon maintains that MCI's comments and testimony reflect a methodology that was previously advanced and rejected by the Commission in Decision 99-11-050. Therefore, the Commission cannot entertain a fundamental change to the price floor methodology without notice and opportunity to comment as set forth in Pub. Util. Code § 1708. Finally, Verizon asserts that MCI's proposal is based on a flawed interpretation of Decision (D.) 04-11-022, which the Commission recently issued regarding price floors.

AT&T responds that Verizon's motion does not contain a legitimate basis for striking the MCI proposals, but is merely an explanation of why Verizon disagrees with the MCI price floor proposals. According to AT&T, it would be improper to strike the MCI testimony rather than allow rebuttal to it and review the proposal on the merits. AT&T disagrees that the MCI filing was late-filed because Verizon itself did not provide its opening price floor filing until directed by the ALJ in February 2004. Therefore, AT&T argues the MCI price floor proposals at issue in this motion are a proper response to Verizon's price floor filing. Furthermore, AT&T contends that Verizon mischaracterizes MCI's statements with regard to interpretations of D.04-11-022.

I agree with AT&T that Verizon has not provided a valid rationale for striking MCI's reply testimony on price floors filed January 28, 2005. First, I do not agree with Verizon that the filing is late and therefore improper because MCI is legitimately responding to the opening price floor testimony presented by Verizon.

Likewise, Verizon's argument that MCI's proposal should be stricken based on § 1708 is inappropriate. § 1708 does not bar parties from requesting the Commission alter a prior order, although it does require notice and an opportunity to be heard. Further, the procedural protections of § 1708 only apply to an "order rescinding, altering, or amending a prior order or decision."

The prior decision that Verizon cites set price floors only for Pacific Bell (now SBC California). What is at issue here are the price floors for Verizon. I do not agree that setting price floors for Verizon using a different methodology than was previously used for Pacific Bell in any way amends or rescinds the prior order used for Pacific Bell.[1]

Second, although Verizon argues MCI's price floor methodology should be stricken because it was rejected by the Commission more than five years ago, this is an argument that Verizon is free to make in rebuttal to the MCI filing. Verizon is essentially asking me to review the substance of MCI's proposal now and strike it from the record. I prefer to examine the MCI proposal, as well as responses from other parties on the merits of MCI's proposal, in the normal course of this proceeding. Finally, MCI and Verizon appear to have differing interpretations of D.04-11-022 and how it might impact the setting of price floors. Rather than striking the MCI proposal, the parties may brief this issue in their upcoming price floor rebuttal filings.

Therefore, **IT IS RULED** that:

1. The February 2, 2005 motion by Verizon California, Inc. (Verizon) to compel discovery is granted in part such that Joint Commentors shall prepare, no later than March 1, 2005, a list of input changes "red-lined" to reflect all inputs

[1] It is unclear if MCI's proposal actually constitutes an amendment or alteration of D.99-11-050. If MCI believes that its proposal will alter or amend the prior decision, then it should make sure that all parties to the prior decision have been served with a copy of its proposal and provided an opportunity to participate in the proceeding.

adjusted in the November 9, 2004 HAI Model Version 5.3 rebuttal filing from earlier filings. Verizon's motion to compel is denied in all other respects.

2. The February 8, 2005 motion by Verizon to strike portions of reply comments and testimony of MCI, Inc. is denied.

Dated March 7, 2005, at San Francisco, California.

Dorothy Duda
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motion to Compel Discovery In Part and Denying Motion to Strike on all parties of record in this proceeding or their attorneys of record.

Dated March 7, 2005, at San Francisco, California.

Antonina V. Swansen

N O T I C E

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